

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEITH E. BERRY,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF CORRECTIONS and
CCO RUSSELL ALFARO,

Defendants.

Case No. C10-5078BHS

ORDER OVERRULING
PLAINTIFF'S OBJECTIONS AND
ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 33) and Plaintiff's ("Berry") objection to the Report and Recommendation. Dkt. 36. The Court has considered the Report and Recommendation, Berry's objections, and the remaining record, and hereby adopts the Report and Recommendation for the reasons stated herein.

I. FACTUAL AND PROCEDURAL HISTORY

On December 14, 2010, Magistrate Judge Creatura issued a Report and Recommendation recommending that summary judgment be granted as to Defendants State of Washington and Department of Corrections and denied as to Defendant CCO Russell Alfaro ("Alfaro"). Dkt. 33. On December 21, 2010, Berry filed an objection. Dkt. 36. Defendants did not file a response.

In February 2010, Berry filed a civil rights complaint under 42 U.S.C. § 1983 against the Defendants, alleging that his rights were violated when he was wrongfully detained for

1 nineteen days beyond his original sentence as a result of an alleged false no-contact order
2 violation.

3 On December 14, 2010, the Magistrate Judge recommended that the Court grant
4 summary judgment as to State of Washington and Department of Corrections because they
5 are not “persons” for purposes of 42 U.S.C. § 1983. However, the Magistrate Judge
6 recommended that the Court deny summary judgment as to Alfaro finding that questions of
7 material fact exist with respect to Berry’s complaint against Alfaro. Berry objected to the
8 Report and Recommendation. Dkt. 36.

9 II. DISCUSSION

10 The Court overrules Berry’s objection and adopts Magistrate Judge Creatura’s Report
11 and Recommendation. First, neither a state nor its officials acting in their official capacities
12 are “persons” under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58,
13 71 (1989). Because the claims against State of Washington and Department of Corrections
14 are legally frivolous and are not subject to suit under the Act, the Court adopts the
15 Magistrate Judge’s recommendation to grant summary judgment as to these Defendants.

16 Secondly, although Berry filed an “objection” to the Magistrate Judge’s Report and
17 Recommendation, it appears that his response is more properly the subject of a motion to
18 amend his complaint. In his “objection,” Berry does not identify any erroneous legal
19 conclusion in the Magistrate Judge’s Report and Recommendation. *See* Dkt. 36. Instead,
20 Berry attempts to clarify matters which the Magistrate Judge noted “do not appear to
21 coalesce into a cognizable cause of action.” Dkt. 33 at 17, note 1. These clarifications have
22 little bearing on the Report and Recommendation. To the extent that these clarifications are
23 relevant, this order does not foreclose Berry’s opportunity to amend his complaint to include
24 allegations against other specific persons.

25 Finally, the Court agrees with the Magistrate Judge’s recommendation to deny
26 summary judgment as to Alfaro because a question of material fact remains as to whether
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1 Alfaro gave Berry a verbal no-contact order and whether Alfaro knowingly placed a false
2 hold on Berry's release.

3 **III. CONCLUSION**

4 The Court having considered the Report and Recommendation, Berry's objections,
5 and the remaining record, does hereby find and order:

- 6 (1) Plaintiff's objections are **OVERRULED**;
7 (2) The Report and Recommendation is **ADOPTED**; and
8 (3) The State of Washington's and Department of Corrections' motion for
9 summary judgment is **GRANTED**, and Alfaro's motion for summary
10 judgment is **DENIED** as discussed herein.

11 DATED this 20th day of January, 2011.

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14 BENJAMIN H. SETTLE
15 United States District Judge
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